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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

In re J.L., a Person Coming Under the Juvenile Court Law.	H043273 (Santa Clara County Super. Ct. No. 3-15-JV-141105)
THE PEOPLE, Plaintiff and Respondent, v. J.L., Defendant and Appellant.	

Multiple wardship petitions were filed against J.L. (minor). After minor was terminated from the deferred entry of judgment (DEJ) program, the juvenile court found that he came within the provisions of Welfare and Institutions Code section 602[1] and adjudged him a ward of the court (§ 725, subd. (b)).

On appeal from the judgment (§ 800, subd. (a)), minor raises an insufficiency of the evidence claim against the juvenile court's finding that he violated Vehicle Code section 20002, subdivision (b), as alleged in count 2 of the petition filed on June 2, 2015. He also attacks probation conditions requiring him to submit his electronic devices and his social media sites to warrantless searches and to provide his passwords thereto as

[1] All further statutory references are to the Welfare and Institutions Code unless otherwise specified.

constitutionally overbroad.[2] Minor does not challenge the substantiality of the evidence supporting the juvenile court's findings as to the truth of other allegations contained in that petition, the propriety of its determination that he comes within the provisions of section 602, or the propriety of its declaration making him a ward of the court.

We conclude that the evidence is insufficient to support the court's true finding as to the allegations of count 2 and that finding must be vacated. In our view, the challenged probation conditions are not constitutionally overbroad on their face.

I

Procedural History

In a juvenile wardship petition filed on February 19, 2015 (Petition A), it was alleged that minor possessed a dirk or a dagger in violation of Penal Code section 21310, a felony, on or about February 14, 2015. The probation officer's detention hearing report indicated that police officers responded to a report of a gang fight involving a person with a machete. When officers made contact with minor, they found a machete with a 10-inch blade in minor's pants pocket. He told the officers that he hung out with Sureños, he

[2] A related issue is now pending before the Supreme Court in *In re Ricardo P.* (2015) 241 Cal.App.4th 676 (*Ricardo P.*), review granted February 17, 2016, S230923. According to the court's web site, the case presents the following issue: "Did the trial court err by imposing an 'electronics search condition' on the juvenile as a condition of his probation when that condition had no relationship to the crimes he committed but was justified on appeal as reasonably related to future criminality under *People v. Olguin* (2008) 45 Cal.4th 375 because it would facilitate the juvenile's supervision?" (<http://appellatecases.courtinfo.ca.gov/search/case/mainCaseScreen.cfm?dist=0&doc_id=2126967&doc_no=S230923> [as of June 15, 2017].) In addition, the Supreme has granted review in a number of related cases (both published and unpublished), but deferred briefing or further action pending decision in *Ricardo P.* (See e.g., *In re Q.R.* (2017) 7 Cal.App.5th 1231 (*Q.R.*), review granted April 12, 2017, S240222; *People v. Nachbar* (2016) 3 Cal.App.5th 1122, review granted December 14, 2016, S238210; *In re J.E.* (2016) 1 Cal.App.5th 795, review granted October 12, 2016, S236628; *In re A.S.* (2016) 245 Cal.App.4th 758, review granted May 25, 2016, S233932; *In re Mark C.* (2016) 244 Cal.App.4th 520, review granted April 13, 2016, S232849; *In re Alejandro R.* (2015) 243 Cal.App.4th 556, review granted March 9, 2016, S232240; *In re Patrick F.* (2015) 242 Cal.App.4th 104, review granted February 17, 2016, S231428.)

possessed the weapon for protection, he had just been "checked" by individuals who he believed intended to harm him, and that he was "having 'a little bit of problems' with Nortenos." After further inquiry regarding gang activity, he admitted that he "bang[s]." Minor also admitted that he had not attended high school in a couple of months.

Following a determination that minor was eligible for DEJ (§ 790), minor admitted the offense. The probation officer's suitability hearing report found minor suitable for DEJ, although the officer expressed some hesitation in making that finding because of minor's evasiveness about his gang activity. The court found that minor was suitable for DEJ (§ 790), and it issued a DEJ order, requiring minor to comply with the DEJ program contract, which minor signed. The contract's conditions required, among other things, that minor engage in "pro-social activities" and gang intervention services, and they forbid gang clothing, gestures and tattoos.

A second juvenile wardship petition was filed on April 16, 2015 (Petition B). It alleged that minor had violated Vehicle Code section 10851, subdivision (a), by driving and taking a vehicle, a Honda, without the owner's consent on or about April 14, 2015.

The probation officer's detention hearing report, filed April 17, 2015, indicated that, when law enforcement attempted to stop a stolen green Honda Accord, the driver accelerated and unsuccessfully attempted to flee. The driver and two passengers, including minor who was in the back seat, were taken into custody. Minor and the other passenger admitted they were Sureño gang members. Minor was found in possession of a blue handkerchief bandana; he was wearing a blue rosary around his neck and a black San Jose Sharks beanie. The driver, who admitted associating with Sureño gang members, had a concealed knife. A "modified key" was found on the driver's seat. The front-seat passenger had gang-related tattoos, including the tattoo "VST," an abbreviation for the criminal street gang Varrio Sureño Town. He was "found in possession of an engine oil stick stem (commonly used to pass vehicle ignition switches)."

The April 2017 detention report further disclosed that minor enrolled in a high school in early March 2017. He was referred to California Youth Outreach for gang intervention services on March 17, 2015. Minor refused to submit to a urinalysis on March 24, 2015. Minor was suspended from school after he was found in possession of marijuana and a locking blade knife on campus on April 2, 2015. On April 15, 2015, Deputy Probation Officer Sam Conerly with the Juvenile Probation Department's gang unit reported to minor's supervising probation officer that "minor had been seen with validated Vario Mexicano Locos (VML) members in the past few months . . . ." Although minor was referred to the school district for placement, he had failed to report as directed. Minor's probation officer requested that the court fail minor from the DEJ program and sustain Petition A.

At the detention hearing, the court detained minor in secure custody.

The report of minor's probation officer for the DEJ "Parte Review" hearing stated that the District Attorney had dismissed Petition B for insufficient evidence and that minor had been released from juvenile hall on April 28, 2015. Minor's case had been accepted into the gang unit for supervision. It had been reported to the minor's probation officer that minor had been the victim of a gang assault by "two Norteno neighbors," one of whom had a knife, in front of minor's residence on April 29, 2015. The new recommendation was to allow minor to continue on the DEJ program and to review the matter in three months.

At the DEJ "Parte Review" hearing on May 11, 2015, the court continued the matter to August 10, 2015 for further review.

On June 2, 2015, a third juvenile wardship petition (Petition C) was filed. It alleged that minor had committed three crimes on or about May 29, 2015: (1) a violation of Vehicle Code section 10851, subdivision (a), by driving and taking a vehicle, a Honda, without the owner's consent (count 1); (2) a violation of Vehicle Code section 20002, subdivision (b), by failing to comply with the requirements of its subdivision (a)

(notification and reporting) after the vehicle he parked, "became a runaway vehicle," and was "involved in an accident resulting in damage to property" (count 2); and (3) a violation of Penal Code section 148, subdivision (a)(1), by willfully resisting, delaying and obstructing a peace officer (count 3).

Following the detention hearing, the court ordered minor detained in secure custody, but authorized probation to release minor on cell phone EMP (electronic monitoring program), provided specified services were in place.

The report of Probation Officer Conerly, dated August 10, 2015, indicated that the minor's case had been transferred to the gang unit in May 2015 due to minor's continued gang activity. It indicated that minor had been involved in a gang-related fight with another student off campus, that he had been caught with a gang-related drawing at school, and that minor had been suspended from his latest school.

An EMP memorandum report, dated August 20, 2015, reported that minor was compliant with the EMP, which he began on June 10, 2015. Minor was attending high school, and the six drugs tests to which minor had submitted while in the program were negative. But an EMP memorandum report, dated September 9, 2015, reported that minor tested positive for marijuana on August 31, 2015. An EMP memorandum report, dated October 20, 2015, reported that minor had submitted four clean drug tests and was compliant with the program.

A contested jurisdiction hearing was held on December 1, 2015. The court found the allegations of Petition C were true beyond a reasonable doubt as to all counts. The court deemed minor to have failed the DEJ program and sustained Petition A.

The probation officer's report, filed December 28, 2015, described the circumstances of minor's offenses under Petition C. On May 29, 2015, police responded to the report of a firearm being discharged. Upon arriving to scene, officers saw a stolen Honda Accord being driven by minor, who then began driving at a high rate of speed in an attempt to avoid the officers. Minor exited the vehicle and unsuccessfully attempted

to flee on foot. Officers were unable to locate the front-seat passenger, but they did apprehend the back-seat passenger.

The report stated that, according to school records, minor had not been attending high school for weeks. It disclosed that, when minor was attending school, he had been "involved in some gang tension" there. Minor reportedly had often worn blue shoes to school and had been seen antagonizing rival gang members there. The report described minor as "heavily gang entrenched" based on his "recent behavior, school attendance, style of dress, and associates." The report recommended that the court adjudge minor a ward of the court and impose "full Gang Orders" "[d]ue to [minor's] delinquent peer association with Sureno gang members and associates."

At the disposition hearing on December 28, 2015, the court declared minor a ward of the court and adopted the recommended findings and orders set forth in the probation report dated December 28, 2015. The court ordered minor to serve 60 actual days on cell phone EMP. It returned minor to parental custody under the supervision of the probation officer under numerous terms and conditions, including multiple gang conditions (which are not challenged on appeal). In addition to a general warrantless search condition, the court imposed two conditions that together required minor to provide all passwords to any electronic devices and social medial sites and to submit those devices and sites to warrantless searches.

Minor timely appealed.

II

Discussion

A. *Finding that Minor Violated Vehicle Code section 20002, Subdivision* (*b*)

Minor asserts that the evidence was insufficient to support the court's finding that he violated Vehicle Code section 20002, subdivision (b). He argues that although the car, which he was found to have been driving, rolled and struck a parked van, there was no evidence of any resulting damage.

Vehicle Code section 20002, subdivision (b), provides: "Any person who parks a vehicle which, prior to the vehicle again being driven, becomes a runaway vehicle and is involved in an accident *resulting in damage to any property*, attended or unattended, shall comply with the requirements of this section relating to notification and reporting and shall, upon conviction thereof, be liable to the penalties of this section for failure to comply with the requirements."[3] (Italics added.)

Respondent argues that proof of damage was unnecessary to prove a violation of Vehicle Code section 20002, citing *People v. Carbajal* (1995) 10 Cal.4th 1114 (*Carbajal*). In *Carbajal*, the defendant pleaded no contest to a charge of violating Vehicle Code section 20002, subdivision (a). (*Carbajal*, *supra*, at p. 1119.) "At the time of the offense [in *Carbajal*], Vehicle Code section 20002, subdivision (a) provided: 'The driver of any vehicle involved in an accident resulting in damage to any property, including vehicles, shall immediately stop the vehicle at the scene of the accident and shall then and there do one of the following: [¶] (1) Locate and notify the owner or person in charge of that property of the name and address of the driver and owner of the vehicle involved and, upon locating the driver of any other vehicle involved or the owner or person in charge of any damaged property, upon being requested, present his or her driver's license, vehicle registration, and evidence of financial responsibility as specified

[3] On appeal, minor does not attack the sufficiency of the evidence to support the court's implicit finding that he parked the stolen vehicle.

in subparagraph (B) of paragraph (2) to the other driver, property owner, or person in charge of that property. The information presented shall include the current residence address of the driver and of the registered owner. If the registered owner of an involved vehicle is present at the scene, he shall also, upon request, present his driver's license information, if available, or other valid identification to the other involved parties.' " (*Id.* at p. 1119, fn. 1.)

The issue in *Carbajal* was "whether, when a defendant is convicted of leaving the scene of an accident in violation of Vehicle Code section 20002, subdivision (a) (commonly known as 'hit-and-run'), a trial court, in the proper exercise of its discretion, may order restitution as a condition of probation." (*Carbajal, supra,* 10 Cal.4th at p. 1118, fn. omitted.) The court held that, "in the proper exercise of its discretion, may condition a grant of probation for a defendant convicted of fleeing the scene of an accident on payment of restitution to the owner of the property damaged in the accident." (*Id.* at pp. 1126-1127; see *id.* at p. 1119.) The reason for its holding was that "[a] restitution condition in such a case can be reasonably related to the offense underlying the conviction and can serve the purposes of rehabilitating the offender and deterring future criminality." (*Id.* at p. 1119.)

In finding that "restitution is related to the crime of leaving the scene of the accident" (*Carbajal, supra,* 10 Cal.4th at p. 1124), the court stated: " 'The cost of a "hit and run" violation is paid for by *every* law-abiding driver in the form of increased insurance premiums. The crime with which the defendant is charged is complete upon the "running" whether or not his conduct caused substantial or minimal (or indeed any) damage or injury; it is the *running* which offends public policy.' (*People v. McWhinney* (1988) 206 Cal.App.3d Supp. 8, 12.)" (*Ibid.*)

First, "it is axiomatic that cases are not authority for propositions not considered. [Citations.]" (*People v. Alvarez* (2002) 27 Cal.4th 1161, 1176.) " 'An appellate decision is not authority for everything said in the court's opinion but only "for the points actually

involved and actually decided." ' [Citation.]" (*People v. Knoller* (2007) 41 Cal.4th 139, 155.) In *Carbajal*, the Supreme Court did not decide the elements of a violation of Vehicle Code section 20002, subdivision (b).

The corollary is that "[l]anguage used in any opinion is of course to be understood in the light of the facts and the issue then before the court . . . . [Citations.]" (*Ginns v. Savage* (1964) 61 Cal.2d 520, 524, fn. 2.) In *Carbajal*, the defendant "was driving his car when he collided with an unoccupied vehicle, legally parked on the side of the road, causing damage to the parked car." (*Carbajal*, *supra*, 10 Cal.4th at p. 1119.) Further, the defendant "concede[d] [that] he 'committed a negligent act of driving that caused damage to [the victim's] parked car.' " (*Id*. at p. 1124.) Thus, in *Carbajal*, there was no damages issue.

Second, the quoted language in *Carbajal* suggesting that evidence of damage is not necessary to prove a violation of Vehicle Code section 20002, subdivision (a), was mere dictum. "Obiter dictum," often shortened to "dictum," is defined as " '[a] judicial comment made while delivering a judicial opinion, but one that is unnecessary to the decision in the case and therefore not precedential (although it may be considered persuasive).' " (*People v. Vang* (2011) 52 Cal.4th 1038, 1047, fn. 3; see *Morse v. De Adro* (1895) 107 Cal. 622, 626, italics omitted ["It is the invariable rule, well understood by the profession, that an opinion of this court becomes authority only upon the point decided, and that obiter dicta are of no binding force or effect"].)

Insofar as respondent is relying upon *Carbajal*'s dictum as persuasive authority for the proposition that proof of resulting property damages is unnecessary to prove a violation of Vehicle Code section 20002, subdivision (b), we are unconvinced. *Carbajal* itself recognized that damages were an element of a violation of subdivision (a) of Vehicle Code section 20002, noting that "[t]he essential elements" of such a violation were "that the defendant: (1) knew he or she was involved in an accident; (2) knew damage resulted from the accident; and (3) knowingly and willfully left the scene of the

accident (4) without giving the required information to the other driver(s). [Citation.]" (*Carbajal, supra,* 10 Cal.4th at p. 1123, fn. 10.) The standard instruction for such violation instructs that the People must prove, among other things, that "[t]he accident caused damage to someone else's property." (CALCRIM No. 2150 (2017 ed., Vol. 2) p. 169.)

Moreover, accepting respondent's construction of Vehicle Code section 20002, subdivision (b), would render its language "resulting in damage to any property" superfluous in contravention of cardinal principles of statutory interpretation. "The fundamental rule is that a court 'should ascertain the intent of the Legislature so as to effectuate the purpose of the law.' [Citation.] In determining such intent '[t]he court turns first to the words themselves for the answer.' [Citation.] 'If possible, significance should be given to every word, phrase, sentence and part of an act in pursuance of the legislative purpose.' [Citation.] '[A] construction making some words surplusage is to be avoided.' [Citation.]" (*People v. Black* (1982) 32 Cal.3d 1, 5.)

Without any citation to the record, respondent alternatively asserts that, in any event, "[t]he juvenile court reasonably could conclude, without benefit of photographs of the vehicles or testimony of their owners, that the collision dented metal and scraped paint." The evidence indicated that after a police officer activated the patrol car's emergency lights and sirens, the stolen Honda Accord, slowed and the driver and front-seat passenger of the stolen Honda Accord exited the vehicle and fled on foot. The vehicle, which had not come to a complete stop, rolled forward into a parked vehicle, an older van. A police officer testified that he took photographs of "the actual vehicle in the collision," but apparently, they were not admitted into evidence. The owner of the Honda Accord testified that after this May 2015 incident the vehicle's ignition did not work properly in that the key could be used to start the car but then "it would just . . . turn off." But there was no evidence that the "accident" itself resulted in property damage, either to the van or other property.

While one might expect that a parked van struck by a rolling vehicle would sustain damage, the burden was on respondent to present sufficient evidence of the element of damage. (See *People v. Booker* (2011) 51 Cal.4th 141, 185 ["government has the burden to prove guilt, beyond a reasonable doubt, as to each element of each charged offense"]; *Estelle v. McGuire* (1991) 502 U.S. 62, 69 ["prosecution's burden to prove every element of the crime is not relieved by a defendant's tactical decision not to contest an essential element of the offense"]; *In re Winship* (1970) 397 U.S. 358, 364 [due process clause requires "proof beyond a reasonable doubt of every fact necessary to constitute the crime" with which a defendant is charged], 368 [reasonable doubt standard constitutionally applies to proof of criminal acts alleged in a juvenile delinquency proceeding]; *In re Cheri T.* (1999) 70 Cal.App.4th 1400, 1404 [same standard proof applies in juvenile delinquency proceedings and adult criminal trials].) Here, we have no evidence of the speed of the Honda Accord at the moment of contact with the van and other evidence from which to infer actual damage resulted from that accident.

"Inferences drawn from the evidence must be logical and reasonable, not merely speculative. [Citations.]" (*People v. Bryant, Smith and Wheeler* (2014) 60 Cal.4th 335, 405; see Evid. Code, § 600, subd. (b).) "[One] may *speculate* about any number of scenarios that may have occurred . . . . A reasonable inference, however, 'may not be based on suspicion alone, or on imagination, speculation, supposition, surmise, conjecture, or guess work. [¶] . . . A finding of fact must be an inference drawn from evidence rather than . . . a mere speculation as to probabilities without evidence.' [Citation.]" (*People v. Morris* (1988) 46 Cal.3d 1, 21, disapproved on another ground in *In re Sassounian* (1995) 9 Cal.4th 535, 543, fn. 5.)

"Claims challenging the sufficiency of the evidence to uphold a judgment are generally reviewed under the substantial evidence standard. Under that standard, ' "an appellate court reviews the entire record in the light most favorable to the prosecution to determine whether it contains evidence that is reasonable, credible, and of solid value,

from which a rational trier of fact could find [the elements of the crime] beyond a reasonable doubt." ' [Citations.]" (*In re George T.* (2004) 33 Cal.4th 620, 630-631.) "The same standard of appellate review is applicable in considering the sufficiency of the evidence in a juvenile proceeding as in reviewing the sufficiency of the evidence to support a criminal conviction." (*In re Sylvester C.* (2006) 137 Cal.App.4th 601, 605; see *In re Michael M.* (2001) 86 Cal.App.4th 718, 726, fn. 22; *In re Roderick P.* (1972) 7 Cal.3d 801, 808-809.)

Even viewing the evidence in a light most favorable to the juvenile court's finding, we find no substantial evidence in the record from which the court could reasonably infer that the stolen Honda Accord was "involved in an accident resulting in damage to any property" (Veh. Code, § 20002, subd. (b)). Accordingly, the evidence is insufficient to support a finding that minor violated subdivision (b) of section 20002 of the Vehicle Code, and the true finding as to count 2 of Petition C must be vacated.

B. *Warrantless Searches of Electronic Devices and Social Media Sites*

1. *Minor's Contentions*

As indicated, minor challenges as unconstitutionally overbroad two probation conditions permitting warrantless searches of electronic devices and social media sites and requiring him to provide his passwords thereto. Probation condition No. 24 states: "The minor shall provide all passwords to any electronic devices (including but not limited to cellular telephones, computers or notepads) within his or her custody or control and shall submit said devices to search at any time without a warrant by any peace officer." We will refer to this condition as the electronic devices condition. Probation condition No. 25 states: "The minor shall provide all passwords to any social media sites (including but not limited to Facebook, Instagram, Twitter and Mocospace) and shall submit said sites to search at any time without a warrant by any peace officer." We will refer to this condition as the social media condition.

Our review is restricted to facial constitutional defects since no objections to those probation conditions were raised in the court below.[4] (See *Sheena K., supra,* 40 Cal.4th at pp. 886-889.) Only "a challenge to a term of probation on the ground of unconstitutional vagueness or overbreadth that is capable of correction without reference to the particular sentencing record developed in the trial court *can* be said to present a pure question of law" that may be raised on appeal for the first time. (*Id.* at p. 887.) Facial constitutional challenges to the "phrasing or language of a probation condition" "does not require scrutiny of individual facts and circumstances but instead requires the review of abstract and generalized legal concepts—a task that is well suited to the role of an appellate court." (*Id*. at p. 885.)

On the other hand, "a probation condition may not be patently unconstitutional but may suffer nonetheless from vagueness or overbreadth" based on the particular facts. (*Sheena K., supra,* 40 Cal.4th at p. 887.) Not " 'all constitutional defects in conditions of probation may be raised for the first time on appeal, since there may be circumstances that do not present "pure questions of law that can be resolved without reference to the particular sentencing record developed in the trial court." [Citation.] In those circumstances, "[t]raditional objection and waiver principles encourage development of the record and a proper exercise of discretion in the trial court." [Citation.]' [Citation.]" (*Id*. at p. 889.)

Here, minor raises three, related overbreadth contentions. The California Supreme Court has stated that "[a] probation condition that imposes limitations on a person's constitutional rights must closely tailor those limitations to the purpose of the condition

[4] Minor's failure to timely challenge the probation conditions in the juvenile court on the ground that they were unreasonableness waived any such claim on appeal. (*People v. Welch* (1993) 5 Cal.4th 228, 237; see *In re Sheena K.* (2007) 40 Cal.4th 875, 883, fn. 4 (*Sheena K.*).)

to avoid being invalidated as unconstitutionally overbroad. [Citation.]"[5] (*Sheena K.*, *supra*, 40 Cal.4th at p. 890.) "The essential question in an overbreadth challenge is the closeness of the fit between the legitimate purpose of the restriction and the burden it imposes on the *defendant's constitutional rights*—bearing in mind, of course, that perfection in such matters is impossible, and that practical necessity will justify some infringement." (*In re E.O.* (2010) 188 Cal.App.4th 1149, 1153 (*E.O.*), italics added.) "Conditions which infringe on constitutional rights are not automatically invalid." (*In re White* (1979) 97 Cal.App.3d 141, 149-150.)

[5] The underpinning of a challenge to a probation condition on grounds it is unconstitutionally overbroad appears to be substantive due process. A line of United States Supreme Court cases "interprets the Fifth and Fourteenth Amendments' guarantee of 'due process of law' to include a substantive component, which forbids the government to infringe certain 'fundamental' liberty interests *at all*, no matter what process is provided, unless the infringement is narrowly tailored to serve a compelling state interest. [Citations.]" (*Reno v. Flores* (1993) 507 U.S. 292, 301-302.) "[N]arrow tailoring is required only when fundamental rights are involved." (*Id.* at p. 305.) But there are certain exceptions. Generally, "the proper standard for determining the validity of a prison regulation claimed to infringe on an inmate's constitutional rights is to ask whether the regulation is 'reasonably related to legitimate penological interests.' [Citation.]" (*Washington v. Harper* (1990) 494 U.S. 210, 223, abrogated on another ground in *Sandin v. Conner* (1995) 515 U.S. 472, 480-484 & fn. 5.) Ordinarily, "[t]his is true even when the constitutional right claimed to have been infringed is fundamental, and the State under other circumstances would have been required to satisfy a more rigorous standard of review. [Citation.]" (*Ibid.*; but see *Johnson v. California* (2005) 543 U.S. 499, 510-511 [applying strict scrutiny to equal protection challenge to policy of racial segregation in correctional facility.) The United States Supreme Court has not determined the proper standard to be applied to a substantive due process challenge to a probation condition infringing upon a probationer's constitutional rights. But the court has stated that "[i]nherent in the very nature of probation is that probationers 'do not enjoy "the absolute liberty to which every citizen is entitled." ' [Citation.]" (*United States v. Knights* (2001) 534 U.S. 112, 119.) It has indicated that "a court granting probation may impose reasonable conditions that deprive the offender of some freedoms enjoyed by law-abiding citizens." (*Ibid.*; see *id.* at p. 122 [holding warrantless search of the probationer that was supported by reasonable suspicion and authorized by a probation condition was reasonable within the meaning of the Fourth Amendment].)

2. *Alleged Failure to Adequately Define* "*Electronic Device*"

Minor first asserts that the electronic device condition is unconstitutionally overbroad because it fails to adequately define "electronic device" and that the term, if broadly construed, might encompass "a digital television, [a] video game console, [an] answering machine, [a] beeper, [a] personal digital assistant . . . or personal organizer, [a] digital scanner, [a] digital oven, [a] digital washing machine," a "Kindle Fire," and a "DVD player." He quotes language from *People v. Bravo* (1987) 43 Cal.3d 600 (*Bravo*), which adopted an objective test for determining the scope of a probation condition. (*Id*. at p. 606; see *id*. at p. 607 [search condition must "be interpreted on the basis of what a reasonable person would understand from the language of the condition itself"].) In *Bravo*, the California Supreme Court stated: "Law enforcement officers who rely on search conditions in probation orders, the probationer himself, and other judges who may be called upon to determine the lawfulness of a search, must be able to determine the scope of the condition by reference to the probation order." (*Id*. at p. 606.) Minor now asks this court to modify the electronic device condition "to limit 'electronic devices' to any cell phones, computers and/or notepads or tablets within his control so that an officer has access to his text messages, voice mail messages, call logs, photographs and email account(s)."

Minor has not asserted that the term "electronic device" is unconstitutionally vague,[6] but the meaning of the term is important in determining its reach. In the context

[6] Constitutional challenges to conditions on vagueness and overbreadth grounds are "conceptually quite distinct." (*E.O., supra*, 188 Cal.App.4th at p. 1153.) "A probation condition 'must be sufficiently precise for the probationer to know what is required of him, and for the court to determine whether the condition has been violated,' if it is to withstand a challenge on the ground of vagueness. [Citation.]" (*Sheena K., supra*, 40 Cal.4th at p. 890.) "[T]he underpinning of a vagueness challenge is the due process concept of 'fair warning.' [Citation.]" (*Ibid*.) *Sheena K*. explained: "The vagueness doctrine bars enforcement of ' "a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application." ' [Citations.]' [Citation.] A vague

of this case, the word "device" is reasonably understood as "a piece of equipment or a mechanism designed to serve a special purpose or perform a special function <an electronic~>." (Merriam-Webster's Collegiate Dict. (2009 11th ed.) p. 342.)The word "electronic" is reasonably understood as "of, relating to, or being a medium . . . by which information is transmitted electronically." (*Id.*, at p. 401.) The term "electronic device" must also be construed in context of the language of the condition, which indicates that it concerns electronic devices, such as cell phones and computers, whose content may be searched. That means that kitchen appliances, such as an ordinary oven or a washing machine, are not within the purview of this condition even if they have digital controls and displays.

Further, in claiming that the probation condition is unconstitutionally overbroad because it fails to adequately define the term "electronic device," minor does not present any legal argument identifying his specific constitutional rights that are burdened by any overinclusion of devices. He does not discuss how his proposed modification of the probation condition would make it correlate more closely with its legitimate purposes. Accordingly, we treat his facial overbreadth contention as waived and pass it without consideration. (See *People v. Stanley* (1995) 10 Cal.4th 764, 793.)

Moreover, the probation condition is not unconstitutionally overbroad on its face merely because it encompasses electronic devices other than cell phones, computers, and notepads, which are the specific examples named in the condition. By allowing searches

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law 'not only fails to provide adequate notice to those who must observe its strictures, but also "impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an *ad hoc* and subjective basis, with the attendant dangers of arbitrary and discriminatory application." [Citation.]' [Citation.] In deciding the adequacy of any notice afforded those bound by a legal restriction, we are guided by the principles that 'abstract legal commands must be applied in a specific *context*,' and that, although not admitting of 'mathematical certainty,' the language used must have ' "*reasonable* specificity." ' [Citation.]" (*Ibid.*) "[A] probation condition should not be invalidated as unconstitutionally vague ' " 'if any reasonable and practical construction can be given to its language.' " ' [Citation.]" (*People v. Hall* (2017) 2 Cal.5th 494, 501.)

of the content of other electronic devices that may be password protected, the condition enables a probation officer to ensure that minor is compliant with his other probation conditions, such as minor's many gang-related conditions. (See *People v. Olguin*, *supra*, 45 Cal.4th at pp. 380-381 [a condition of probation that enables a probation officer to effectively supervise a charge is reasonably related to future criminality].) If the electronic devices condition were limited to only the specified electronic devices, the condition would be under-inclusive. Minor would be able to use an unlisted device to circumvent close probation supervision, which is especially critical since minor has been described as "heavily gang entrenched." We reject the claim that the electronic device condition is unconstitutionally overbroad on its face because it fails to adequately define "electronic device."

3. *Privacy Rights of Third Persons*

Citing *In re Malik J*. (2015) 240 Cal.App.4th 896 (*Malik J*.), minor next argues that the challenged probation conditions are unconstitutionally overbroad because they implicate the privacy right of third persons who are not otherwise subject to search or court supervision. He complains that as drafted, the probation conditions would "grant officers 'an unfettered right to retrieve any information accessible from any phone or computer' in [his] possession, including information 'stored in a remote location.' [Citation.]" Minor requests that the conditions be "modified to limit searches to information or data easily accessible to him and, thus, in his possession and subject to his control."

In *Malik J*., the juvenile court imposed a probation condition that required Malik and "his family to permit searches of and disclose all passwords to their electronic devices and social media sites." (*Malik J*., *supra*, 240 Cal.App.4th at p. 899.) One of Malik's arguments was that "the extension of the electronics and social media search condition *to his family* violates his family's Fourth Amendment and due process rights

because the juvenile court had no jurisdiction over Malik's family members." (*Id*. at p. 905.)

The appellate court declared that "the threat of unfettered searches of Malik's electronic communications significantly encroaches on his and potentially third parties' constitutional rights of privacy and free speech." (*Malik J*., *supra*, 240 Cal.App.4th at p. 902.) It concluded that, "[in] view of these significant privacy implications, the electronics search condition must be modified to omit the requirement that Malik turn over passwords to social media sites and to restrict searches to those electronic devices found in his custody and control." (*Ibid*.) In its disposition, the court modified the challenged condition "to omit reference to Malik's family and passwords to social media sites, and to authorize warrantless searches of electronic devices in Malik's custody and control only after the device has been disabled from any internet or cellular connection and without utilizing specialized equipment designed to retrieve deleted information that is not readily accessible to users of the device." (*Id*. at p. 906.)

In analyzing the overbreadth issue, the appellate court in *Malik J*. reasoned: "Remotely stored information may also implicate the privacy interests of third parties who are not otherwise subject to search or court supervision. This remains true even if the information is posted to a social networking Web site or a large group of people. There are hundreds of social networking Web sites, but all essentially have the same characteristics. They allow users to create their unique personal profile, and establish their own network of friends or join existing groups with common interests. Although a user's personal profile is potentially viewable by anyone, the Web sites have privacy features that allow users to set limits on who may access their information and what information may be shared generally. Some Web sites default their settings to allow broad public access, while others default to more private access. (Abilmouna, Social Networking Sites: *What An Entangled Web We Weave* (2012) 39 W. St. U. L.Rev. 99, 102.) In recognition that users of electronic media have a legitimate interest in the

confidentiality of communications in electronic storage at a communications facility, Congress passed the Stored Communications Act (18 U.S.C. § 2701 et seq.). User information stored by social networking sites is protected by the act, and several courts have recognized that users have a reasonable Fourth Amendment expectation of privacy in electronic communications, and that a warrant based upon probable cause may be required to obtain their content. [Citation.]" (*Malik J.*, *supra*, 240 Cal.App.4th at p. 903.)

Even in *Malik J.*, however, the appellate court agreed that "[o]fficers must be able to determine ownership of any devices in a probationer's custody or within his or her control, and search them if they belong to the probationer or if officers have a good faith belief that he or she is a permissive user." (*Malik J.*, *supra*, 240 Cal.App.4th at p. 903.) Unlike the probation condition at issue in *Malik J.*, the electronic devices condition in this case already restricts searches to those electronic devices found in minor's custody or control. In addition, the social media condition in this case does not require minor's family to permit searches of, and disclose all passwords to, their social media sites.

It is respondent's position that minor lacks standing to assert the constitutional rights of third parties and that *Malik J.* did not consider that limitation. We agree that minor has not shown that he is legally entitled to vicariously assert the rights of others.

In making his overbreadth argument concerning third parties' privacy rights, minor does not state the constitutional basis or source of those rights that he asserts are implicated by the challenged probation conditions. Insofar as minor might be invoking Fourth Amendment rights, it is clear that " 'Fourth Amendment rights are personal rights which, like some other constitutional rights, may not be vicariously asserted.' [Citations.]" (*Rakas v. Illinois* (1978) 439 U.S. 128, 133-134; see *id.* at pp. 139-140 [standing is not proper analysis][7]; see *People v. Schmitz* (2012) 55 Cal.4th 909, 932.)

[7] A matter of substantive law, "in order to claim the protection of the Fourth Amendment, a defendant must demonstrate that he personally has an expectation of

Moreover, "[t]he Fourth Amendment cannot be translated into a general constitutional 'right to privacy.' " (*Katz v. United States* (1967) 389 U.S. 347, 350.) Insofar as minor might be relying upon the broader right of privacy established by the California Constitution,[8] that right is purely personal and cannot be asserted by anyone other than the person whose privacy has been invaded. (See *Association for Los Angeles Deputy Sheriffs v. Los Angeles Times Communications LLC* (2015) 239 Cal.App.4th 808, 821.)

Further, it is not clear that the third parties necessarily have a constitutionally-protected reasonable expectation of privacy in the messages, information, images, or videos that are sent by e-mail to minor or posted to minor's social media account. "[I]f a letter is sent to another, the sender's expectation of privacy ordinarily terminates upon delivery. [Citations.] This is true even though the sender may have instructed the recipient to keep the letters private. [Citation.]" (*United States v. King* (6th Cir. 1995) 55 F.3d 1193, 1196.) An e-mail message is analogous to a written letter. (See *Guest v. Leis* (6th Cir. 2001) 255 F.3d 325, 333.)

The same may be true with regard to postings on social media sites. For example, "Facebook users may decide to keep their profiles completely private, share them only with 'friends' or more expansively with 'friends of friends,' or disseminate them to the public at large. [Citation.]" (*United States v. Meregildo* (S.D.N.Y. 2012) 883 F.Supp.2d 523, 525.) "When a social media user disseminates his postings and information to the public, they are not protected by the Fourth Amendment. [Citation.]" (*Ibid*.) Additionally, the individual posting the material has "no justifiable expectation that his

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privacy in the place searched, and that his expectation is reasonable; *i.e.*, one that has 'a source outside of the Fourth Amendment, either by reference to concepts of real or personal property law or to understandings that are recognized and permitted by society.' [Citation.]" (*Minnesota v. Carter* (1998) 525 U.S. 83, 88.)

[8] Article I, section 1, of California's Constitution states: "All people are by nature free and independent and have inalienable rights. Among these are enjoying and defending life and liberty, acquiring, possessing, and protecting property, and pursuing and obtaining safety, happiness, and privacy."

'friends' [will] keep his profile private. *Cf. Barone,* 913 F.2d at 49." (*Id.* at p. 526.) "And the wider his circle of 'friends,' the more likely [the individual's] posts would be viewed by someone he never expected to see them." (*Ibid*.) To date, the Supreme Court "consistently has held that a person has no legitimate expectation of privacy in information he voluntarily turns over to third parties. [Citations.]" (*Smith v. Maryland* (1979) 442 U.S. 735, 743-744 [no legitimate expectation of privacy in phone numbers dialed; use of pen register not a search]; but see *United States v. Jones* (2012) 565 U.S. 400, 402 [Justice Sotomayor concurred in majority opinion holding that Government's installation of a GPS device on a vehicle and its use to monitor the vehicle's movements is a search, but also made the following statement in a separate concurring opinion: "[I]t may be necessary to reconsider the premise that an individual has no reasonable expectation of privacy in information voluntarily disclosed to third parties. [Citations.] This approach is ill suited to the digital age, in which people reveal a great deal of information about themselves to third parties in the course of carrying out mundane tasks"].)

The social media condition in this case does not require minor to turnover someone else's password to access someone else's social media site. The condition is most reasonably understood as requiring minor to provide his own passwords to his personal social media accounts. (See *Bravo, supra,* 43 Cal.3d at p. 606.) We may avoid potential constitutional issues by interpreting the probation condition in an objectively reasonable way. (See *ibid*.)

Thus, even if minor could properly assert third parties' constitutional privacy rights, he has failed to show that either condition, on its face, implicates the constitutional privacy rights of third parties. Because we are reviewing only facial constitutionality, which is a limited inquiry, we decline to speculate whether the challenged conditions might conceivably be applied in a constitutionally impermissible manner.

4. *Alleged Exposure of Private Information to Public View*

Minor claims that the challenged probation conditions are unconstitutionally overbroad because they expose private information, which "has nothing to do with monitoring [him] for criminal activity," to public view. As minor indicates, "minors, as well as adults, possess a constitutional right of privacy under the California Constitution." (*American Academy of Pediatrics v. Lungren* (1997) 16 Cal.4th 307, 334.) But we cannot agree with minor's suggestion that his criminal activities were entirely unrelated to his gang involvement based on the record before us.

In urging us to reject minor's overbreadth contention based upon the potential exposure of his private information, respondent relies in part upon this court's decision in *Q.R., supra,* 7 Cal.App.5th at p. 1235. The minor in *Q.R.* "recorded photographs and video on his cellular phone of consensual sexual activity between himself and Jane Doe, both under 18 years old, and he later extorted money from Doe by threatening to disclose the recordings to other students at their high school." (*Id.* at p. 1233.) "He was placed on juvenile probation after admitting to felony possession of child pornography (Pen. Code, § 311.11, subd. (a)) and extortion (Pen. Code, §§ 518, 520)." (*Ibid.*) The juvenile court imposed a probation condition requiring the "minor to '[s]ubmit all electronic devices under [his] control to a search of any text messages, voicemail messages, call logs, photographs, email accounts and social media accounts, with or without a search warrant, at any time of the day or night, and provide the probation or peace officer with any passwords necessary to access the information specified.' " (*Id.*, at p. 1234.)

In *Q.R.*, we rejected the minor's claim that the probation condition was unconstitutionally overbroad. (*Q.R., supra,* 7 Cal.App.5th at p. 1239.) We began by recognizing that "[j]uvenile probation conditions may be broader than those imposed on adult offenders 'because juveniles are deemed to be more in need of guidance and supervision than adults, and because a minor's constitutional rights are more circumscribed.' (*In re Antonio R.* (2000) 78 Cal.App.4th 937, 941.)" (*Id.* at p. 1235.) In

In re Antonio R., *supra*, at p. 939, the appellate court affirmed the juvenile probation's order requiring minor "to stay out of Los Angeles County unless accompanied by a parent or with prior permission from the probation officer." The court made clear that "when [the state] asserts jurisdiction over a minor, [it] stands in the shoes of the parents," who "may 'curtail a child's exercise of the constitutional rights . . . [because a] parent's own constitutionally protected "liberty" includes the right to "bring up children" [citation,] and to "direct the upbringing and education of children." [Citation.]' [Citations.]" (*Id.* at p. 941.) " '[E]ven where there is an invasion of protected freedoms "the power of the state to control the conduct of children reaches beyond the scope of its authority over adults." ' (*Ginsberg v. New York* (1968) 390 U.S. 629, 638.)" (*In re Victor L.* (2010) 182 Cal.App.4th 902, 910.)

In finding the probation condition valid in *Q.R.*, we stated: "[The] [m]inor stored the illegal photographs and videos on his cellular phone, and he used that phone to send text messages demanding money while implicitly threatening to share the 'pics and videos' with others if Jane Doe did not comply. In the context of this case, robust access to minor's electronic devices is critical to monitor his progress on probation and to ensure that he is not continuing to engage in the sort of criminal conduct that led to him being declared a ward of the court." (*Q.R.*, *supra*, 7 Cal.App.5th at p. 1238.) We found the search condition was "appropriately tailored" "[g]iven the direct relationship between [the] minor's offenses and his use of an electronic device." (*Id.* at p. 1233.)

In *Q.R.*, this court was well aware of the United States Supreme Court's case of *Riley v. California* (2014) 573 U.S. ___ [134 S. Ct. 2473] (*Riley*), which considered the warrantless search of a smart cell phone with "Internet connectivity" (*id.* at p. __ [134 S. Ct. at p. 2480]), which police had seized incident to arrest. The Supreme Court was cognizant in *Riley* that a police search of a cell phone may potentially result in a profound intrusion into the person's privacy. (*Id.* at ___ [134 S. Ct. at pp. 2488-2491].) It consequently concluded police were required to "get a warrant" (*id.* at p. ___ [134

S. Ct. at p. 2495]) before searching cell phones seized incident to arrest, given that they were in effect "minicomputers" (*id*. at p. __ [134 S. Ct. at p. 2489]), that they had "immense storage capacity" (*ibid*.), that they exposed to view "many sensitive records previously found in the home" (*id*. at p. __ [134 S. Ct. at p. 2491]) and "a broad array of private information never found in a home in any form" (*ibid*.), and that "Internet-connected devices" displayed data stored remotely (*ibid.)*. Nevertheless, *Riley*'s holding was "not that the information on a cell phone is immune from search," but instead was that "a warrant is generally required before such a search, even when a cell phone is seized incident to arrest." (*Id*. at p. ___ [134 S. Ct. at p. 2493].)

As indicated in *Q.R.*, however, *Riley* involved an entirely different Fourth Amendment context and is readily distinguishable from cases involving probation conditions. (See *Q.R.*, *supra,* 7 Cal.App.5th at p. 1238.) *Riley* was concerned with the categorical rule governing the scope of a warrantless search incident to arrest, not with the probation supervision of someone found to have committed a crime beyond a reasonable doubt. *Riley* declined to extend the categorical rule governing searches incident to arrest to encompass data on cell phones. (*Riley*, *supra*, 573 U.S. at p. ___ [134 S. Ct. at p. 2485.) The balancing of law enforcement and privacy interests is very different in the present situation, which involves the individualized probation supervision of a single person who is a minor.

As in other Fourth Amendment contexts, a governmental intrusion "must be tested by the Fourth Amendment's general proscription against unreasonable searches and seizures." (*Terry v. Ohio* (1968) 392 U.S. 1, 20, fn. omitted.) "[T]here is 'no ready test for determining reasonableness other than by balancing the need to search [or seize] against the invasion which the search [or seizure] entails.' [Citation.]" (*Id*. at p. 21.) "The touchstone of the Fourth Amendment is reasonableness, and the reasonableness of a search is determined 'by assessing, on the one hand, the degree to which it intrudes upon an individual's privacy and, on the other, the degree to which it is needed for the

promotion of legitimate governmental interests.' [Citation.]" (*United States v. Knights* (2001) 534 U.S. 112, 118-119 (*Knights*).) A person's "status as a probationer subject to a search condition informs both sides of that balance." (*Id*. at p. 119.) Probationers enjoy a lesser expectation of privacy than the general public. (*Ibid*.; see *Samson v. California* (2006) 547 U.S. 843, 853 (*Samson*) [suspicionless parole search of parolee, conducted under statutory authority, does not violate the Constitution].) A person's minority and status as a ward of the court also informs that balance. (See *Sheena K., supra,* 40 Cal.4th at p. 889 [a condition of probation that would be unconstitutional or otherwise improper for an adult probationer may be permissible for a minor under the supervision of the juvenile court].)

The United States Supreme Court has "repeatedly acknowledged that a State's interests in reducing recidivism and thereby promoting reintegration and positive citizenship among probationers and parolees warrant privacy intrusions that would not otherwise be tolerated under the Fourth Amendment. See *Griffin* [*v. Wisconsin* (1987)] 483 U.S. [868,] 879; *Knights, supra,* at 121." (*Samson, supra*, 547 U.S. at p. 853.) In *Samson,* the Supreme Court explained: "As we made clear in *Knights*, the Fourth Amendment does not render the States powerless to address these [state] concerns *effectively*. See 534 U.S., at 121. Contrary to petitioner's contention, California's ability to conduct suspicionless searches of parolees serves its interest in reducing recidivism, in a manner that aids, rather than hinders, the reintegration of parolees into productive society." (*Id*. at p. 854.) It noted that, under California law, a warrantless search pursuant to a condition of probation or parole may not be undertaken for harassment, arbitrary, or capricious reasons. (*Id*. at p. 856; see *Bravo, supra*, 43 Cal.3d at p. 610.)

In this case, although there is no direct relationship between minor's offense and his use of an electronic device or social media site, the challenged probation conditions are important tools for facilitating rehabilitation and preventing recidivism by minor, who has become "heavily gang entrenched" with a Sureño gang. It is common to find

evidence of a gang member's gang-related conduct or communications on electronic devices or social media accounts. (See e.g. *People v. Garcia* (2017) 9 Cal.App.5th 364, 371, & fn. 4 [photographs on cell phone]; *People v. Ocegueda* (2016) 247 Cal.App.4th 1393, 1400 [photographs, telephone contacts for known gang members, messages in which the defendant referred to himself by his gang moniker on cell phone]; *People v. Vasquez* (2016) 247 Cal.App.4th 909, 918 [photographs of the defendant with other Norteno gang members on the defendant's MySpace page]; *In re Art T.* (2015) 234 Cal.App.4th 335, 346 [multiple photographs on minor's Facebook page]; *People v. Valdez* (2011) 201 Cal.App.4th 1429, 1436 [the defendant's MySpace page "devoted to gang-related interests"].) In *Riley*, in searching the seized cell phone, the arresting officer "noticed that some words (presumably in text messages or a contacts list) were preceded by the letters 'CK'—a label that, he believed, stood for 'Crip Killers,' a slang term for members of the Bloods gang." (*Riley*, *supra*, 573 U.S. at p. ___ [134 S. Ct. at p. 2480].) Subsequently, "a detective specializing in gangs" examined the phone and found "videos of young men sparring while someone yelled encouragement using the moniker 'Blood.' " (*Id*. at pp. ___ [134 S. Ct. at pp. 2480-2481].)

The difference between minor succeeding on juvenile probation and minor moving into adult crime may be the closeness of probation supervision. Indications as to whether minor is continuing to associate with other gang members, participating in gang activities or crimes, visiting locations known to be areas of gang-related activity, wearing gang-related clothing, displaying gang-related signs and symbols, obtaining new gang-related tattoos, or making gang-related threats or boasts could come to light through probation searches of his electronic devices and social media sites, assuming he has such. The challenged search conditions may be critical to deterring such conduct, and searches pursuant to those conditions may be essential to timely intervention by his probation officer to prevent future criminality. In our view, the challenged probation conditions are not unconstitutionally overbroad on their face.

The cases cited by minor do not dictate a different result. In *People v. Appleton* (2016) 245 Cal.App.4th 717 (*Appleton*), a felony complaint alleged that the defendant had engaged in oral copulation with a minor (Pen. Code, § 288a, subd. (b)(1)). (*Appleton*, *supra*, at p. 720.) Pursuant to a plea agreement, the defendant pleaded no contest to false imprisonment by means of deceit (Pen. Code, §§ 236, 237, subd. (a)). (*Appleton*, *supra*, at p. 720.) The court granted probation and imposed a condition making the defendant's computers and electronic devices "subject to search for material prohibited by law." (*Id*. at p. 719.)

On appeal, defendant Appleton asserted that the challenged probation condition was both unreasonable and overbroad in violation of the Fourth Amendment and his rights of privacy (*Appleton*, *supra*, 245 Cal.App.4th at pp. 723-724). A different panel of this court concluded that the challenged condition was reasonable, even though "the nexus between the offense and the probation condition [was] somewhat attenuated." (*Id*. at p. 724.) But the panel concluded that the condition, as worded, was unconstitutionally overbroad (*id*. at p. 727). The trial court was directed to, upon remand, strike the condition and to "consider fashioning an alternative probation condition consistent with [our] opinion." (*Id*. at pp. 728-729.)

In reaching its conclusion as to the condition's overbreadth, the panel in *Appleton* relied upon *Riley*. (*Appleton, supra,* 245 Cal.App.4th at p. 725.) *Appleton* suggested that "by allowing warrantless searches of all of defendant's computers and electronic devices, the condition allows for searches of items outside his home or vehicle, or devices not in his custody—e.g., computers or devices he may leave at work or with a friend or relative." (*Ibid*.) It also expressed concern that the challenged probation condition "would allow for searches of vast amounts of personal information unrelated to defendant's criminal conduct or his potential for future criminality." (*Id*. at p. 727.) It was concerned that "a search of defendant's mobile electronic devices could potentially expose a large volume of documents or data, much of which may have nothing to do with

illegal activity," including "for example, medical records, financial records, personal diaries, and intimate correspondence with family and friends." (*Id.* at p. 725.) Lastly, the panel believed that "the state's interest [in that case]—monitoring whether [the] defendant uses social media to contact minors for unlawful purposes—could be served through narrower means." (*Id.* at p. 727)

Minor also relies on *In re P.O.* (2016) 246 Cal.App.4th 288 (*P.O.*), which followed *Appleton*. In *P.O.*, after the filing of a juvenile wardship petition, the minor admitted an amended allegation that he had violated Penal Code section 647, subdivision (f) (misdemeanor disorderly conduct based on public intoxication). (*P.O.*, *supra*, at p. 292 & fn. 2.) On appeal, the minor challenged a probation condition requiring him to " '[s]ubmit person and any vehicle, room or property, electronics including passwords under your control to search by Probation Officer or peace office[r] with or without a search warrant at any time of day or night.' " (*Id.* at p. 300; see *id.* at p. 292.)

Although the appellate court in *P.O.* concluded that "the electronics search condition [was] reasonably related to future criminality" (*P.O.*, *supra*, 246 Cal.App.4th at p. 295), it concluded that the condition was "overbroad because it [was] not narrowly tailored to further P.O.'s rehabilitation." (*Id.* at p. 297, italics omitted.) Since the juvenile court had indicated that its purpose was "to allow monitoring of P.O.'s involvement with drugs" (*id.* at p. 298), the appellate court concluded that the condition required modification to limit searches under the condition to searches of "media of communication reasonably likely to reveal whether he is boasting about drug use or otherwise involved with drugs." (*Ibid.*) It modified the challenged condition to read: " 'Submit your person and any vehicle, room, or property under your control to a search by the probation officer or a peace officer, with or without a search warrant, at any time of the day or night. Submit all electronic devices under your control to a search of any medium of communication reasonably likely to reveal whether you are boasting about

your drug use or otherwise involved with drugs, with or without a search warrant, at any time of the day or night, and provide the probation or peace officer with any passwords necessary to access the information specified. Such media of communication include text messages, voicemail messages, photographs, e-mail accounts, and social media accounts.' " (*Id*. at p. 300.)

P.O. is easily distinguishable from this case since it involved a less serious offense, the minor was not involved in a criminal street gang, and he was subject to a single petition involving the one non-felony crime. *Appleton* likewise did not concern a minor involved in a criminal street gang. We do not fully agree with the reasoning of those cases. But, in any event, they do not control here.

We first emphasize that nothing in the language of the challenged conditions affirmatively allows police to access and view personal bank or financial accounts or medical or lab records that are protected by a separate login user name and/or password that must be inputted each time to access information. The probation conditions explicitly require minor to provide only the passwords to his electronic devices and social media sites, and they allow warrantless searches of only minor's devices and social media sites. We reiterate that minor's electronic device condition already applies only to devices within the minor's "custody or control."

Insofar as minor might have a cell phone or computer or other electronic device containing applications, commonly referred to as "apps," that would allow someone searching them to access and view personal information by clicking on an icon without inputting a separate login (because the app is not password protected or because the device is set up to remember login information and automatically login to the app), that factual circumstance is not before us. The number and variety of apps is immense, and a person's selection of apps is highly individualized. The content of apps also ranges widely. At one end of the spectrum, apps may expose highly personal information, but apps may also provide topical information merely reflecting the user's general interests.

Perusal of information accessible through an app may be relevant to ensuring that a probationer is complying with his probation conditions and/or present no greater intrusion than viewing the analogous physical item, such as a letter, a diary, a calendar, or a personal telephone book or log, etc., commonly found in a home and subject to warrantless search under a standard probation condition. To the extent that minor is implicitly arguing that the challenged probation conditions are unconstitutionally overbroad based upon the information accessible through apps on his particular electronic devices without the necessity of inputting login information (other than the passwords to his devices and social media sites), we find this question to be an intensely fact-based inquiry that must be initially raised in the lower court, which can scrutinize individual facts and circumstances.[9] (Cf. *In re Pedro Q.* (1989) 209 Cal.App.3d 1368, 1373 [observing that, "[f]or example, while a travel restriction may be proper for a minor who lives outside the gang's territory, it may be overbroad for one who lives, works or goes to school within the area"].)

Text and e-mail messages and other types of personal communication or records may properly be the object of a probation search condition aimed at supervising minor because they enable effective probation supervision of minor. A personal diary or journal, whose entries might reveal gang involvement, should not be sacrosanct because it is on an electronic device rather than in physical form (which would be subject to warrantless search under minor's unchallenged general search condition). While minor's personal information that is extraneous to probation supervision might be seen during a warrantless search of his electronic device or his social media site, such information might also be viewed during a warrantless search of a probationer or his property, residence, or vehicle under a standard, general probation search condition.

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[9] In this case, it is not apparent that minor even has a cell phone or a computer. At the disposition hearing, it was reported that minor's family did not have landline. A cell phone unit was provided to facilitate the EMP.

In any event, a warrantless search conducted pursuant to a probation condition is constrained by the rule that it cannot "be undertaken in a harassing or unreasonable manner. [Citations.]" (*People v. Woods* (1999) 21 Cal.4th 668, 682.) In addition, "a search pursuant to a probation search clause may not exceed the scope of the particular clause relied upon" (*ibid.*), and electronic devices or social media sites under the sole control of persons other than minor would not be subject to search pursuant the authority of the challenged probation conditions. (Cf. *Ibid.*)

Probation conditions identical to those now challenged were imposed in *People v. Ebertowski* (2014) 228 Cal.App.4th 1170 (*Ebertowski*). Like minor, the probationer in that case was an admitted gang member. (*Id.* at pp. 1172-1173.) This court determined that the challenged conditions were reasonably related to future criminality because they enabled the probation officer to closely monitor the probationer's gang associations and activities. (*Id.* at p. 1177.) In rejecting an overbreadth challenge to those conditions, this court stated: "The evident purpose of the password conditions was to permit the probation officer to implement the search, association, and gang insignia conditions that were designed to monitor and suppress defendant's gang activity. Without passwords for defendant's devices and social media accounts, the probation officer would not be able to search them under the unchallenged [general warrantless] search condition in order to assess defendant's compliance with the unchallenged association and gang insignia conditions." (*Id.* at p. 1175.) The need for vigilant monitoring and supervision is the same in this case.

It is our conclusion that the challenged probation conditions are not unconstitutionally overbroad on their face.

DISPOSITION

The judgment is reversed for limited purposes. Upon remand, the juvenile court shall vacate its true finding as to count 2, and amend its jurisdiction and disposition orders accordingly.

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ELIA, ACTING P. J.

WE CONCUR:

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BAMATTRE-MANOUKIAN, J.

_____

MIHARA, J.

People v. J.L.
H043273